

The Struggle for Israel's Democracy

Faced with the prospect of judicial reform, Israel's progressive elite and its American allies are threatening to tear the country apart



Gadi Taud writes in [Tablet](#):

The Israeli election in November was, in large part, a referendum on the Netanyahu trial. The jury came back with a clear verdict: not guilty. Israelis, or at least enough of them, became convinced that the trial was a political affair, not a legal one: Israel's left-leaning elites had given up on beating Netanyahu at the ballot box, and so turned to other

means to expel him from politics.

But the majority of Israel's voters did more than acquit Netanyahu in the court of public opinion. A majority of Israeli voters made clear that they will no longer put up with the hollowing out of Israel's democracy by the administrative state—judges, law enforcement officers, legal advisers and the bureaucracy in general will have to stop substituting their own preferences and dictates for those of the Israeli electorate.

The Netanyahu trial and bottom-up demands for judicial reform have thus melded together into a hugely consequential showdown between patricians and plebs, between the old elites and the public at large, between the court and the elected branches of government—and at root, between the power of the administrative state and democratic politics. It is, as the press is now screaming in Israel and outside it, a struggle over soul of Israel's democracy. Only the press has got it backwards. Yariv Levin, Netanyahu's new justice minister, is not out to destroy democracy. He is out to restore it.

Back in 2017, a bestselling conservative Hebrew book articulated the growing frustration on the right in its title: "Why do you vote right and get left?" The book, by journalist and former Netanyahu aide Erez Tadmor, made the answer clear, and it became the operating manual for a new generation of Likud members. The reason the right never really rules, Tadmor argued, is that the left controls the important power centers outside of electoral politics: the mainstream press, the arts, academia, and above all the judicial system and its auxiliaries in law enforcement and Israel's powerful bureaucracy.

At the summit of the judicial-bureaucratic power structure, which exists outside the purview of the consent of the governed, sits the Supreme Court, which in Israel holds powers more awesome than any judiciary in any Western democracy. In

the court's own view, there are literally no limits to its authority. It recognizes no limits on standing, and it exercises judicial review over any government action and any and all legislation, including judicial review of what the court itself declared to be Israel's constitution—our so-called “Basic Laws.”

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While the fact that Israel's constitution has become whatever the Supreme Court declares it to be at any given moment may tickle the hubris of some foreign lawyers and judges, it is blatantly contrary to both the rule of law and to democratic practice. Imagine a U.S. Supreme Court debating the constitutionality of articles in the U.S. Constitution and overturning laws passed by Congress based on how “reasonable” the judge believes them to be, while also vetoing the appointment of new justices, and you'll come close to understanding just how far the doctrine of unelected judicial supremacy has come in Israel, and why a clear majority of Israeli voters have had enough.

In his previous administrations Netanyahu was careful not to pick a fight with the country's judicial oligarchy, preferring to spend his political capital on other subjects—primarily Iran and economics. He assumed, based on experience, that Israel's judicial oligarchy would continue to abide by an unwritten rule: If a politician doesn't try to reform the justice system, they will leave his person—though not necessarily his policies—alone. The flip side of this arrangement was, in any case, more obviously true: Try to advance a reform, and you almost always end up with a criminal investigation, often one that was fabricated, as in the cases of Yaacov Neeman and Reuven Rivlin, both of whom were among those barred from serving as justice ministers by contrived investigations that ended up with nothing. The judiciary had

its own praetorian guard in the Office of the State Attorney, which cultivated a culture of promiscuous yet slow-moving investigations that made sure politicians didn't step out of line.

After Netanyahu won his fourth term in 2015, the despair on the left reached a fever pitch, and the various centers of left-wing power began to clamor for Netanyahu's head. The press led the way with investigative pieces accusing Netanyahu of corruption. Despite the speculative nature of these investigations, law enforcement pursued them with new vigor, leading, finally, to indictments.

The indictments had a paradoxical effect on the struggle for power between bureaucracy and democracy. First, they showed Netanyahu that the judicial oligarchy posed a direct threat to his political fortunes that could not be reasonably abated through the usual program of mutual noninterference. Second, the attacks by the judiciary on Likud's undisputed leader had an energizing effect on his voters.

While removing a justice minister can be seen as a peripheral event, taking down a prime minister, and thus overturning the results of a national election, is a wholly different matter. It can fly, even with his supporters, when a prime minister is clearly proven to be corrupt, as was the case with Ehud Olmert, who ended up serving jail time. But when more than half the public feels its standard-bearer was framed and its ballots effectively shredded, it is unlikely to just accept that result. So both Netanyahu and his voters came to see, more clearly than before, the severity of the problem and the urgency in restoring the balance between the branches of government.

But the indictments and later trial also threatened to neutralize Netanyahu's ability to act. It is difficult for a prime minister to reform the judicial system and put checks on politicized law enforcement when he himself is facing a trial.

How would he escape the obvious suspicion that he is trying to save himself and is willing—as the left dramatically phrases this talking point—to “smash the justice system just to save his own skin”? True, judicial reform is unlikely to interfere with an ongoing trial, except maybe by making the judges more hostile. But perception is crucial here, and so Netanyahu seemed caught in a bind. The question came down to this: Will voters support a reform, or will enough of them see it as cynical, self-serving move on his part?

Last year’s election turned precisely on that question. And the voters gave a clear answer.

First, Likud’s base issued its verdict: The most recent round of Likud primaries drove almost all vocal critics of the judicial system up the party’s list. Other right-wing parties then made judicial reform a condition for joining Netanyahu’s coalition. All these parties, each crucial to the existence of the coalition, represent minority sectors—national-religious, ultra-Orthodox and Mizrahi traditional and Orthodox—that had been shunned at one point or another by a court that purports to protect minorities against the tyranny of the majority. Judicial reform galvanized support for the right and gave it a clear majority in the Knesset: 64 seats in the Netanyahu block versus 56 in the Never-Bibi block, including the anti-Zionist Arab parties, most of which historically do not join coalitions.

Netanyahu is a savvy politician, and he seemed to have realized the enormity of the wave of public anger against Israel’s imperial Supreme Court. He likely calculated that he could either ride that wave or be drowned under it. And when it became clear his own electorate would not forgive him if he procrastinated, he went against his careful and conservative character—and his personal legal interests—and put his weight behind judicial reform.

Until the ministerial appointments were announced, many on the

right were still pessimistic. Netanyahu never touched the judicial oligarchy before, they said, and he'll find a way to avoid it this time, too. More worrying, some said, he will use public anger as leverage to intimidate the court with the specter of reform, then drop the reform in exchange for a plea deal.

Both sides of this argument, though, agreed on what the litmus test would be. Yariv Levin, an introvert with a reputation for honesty and calm determination, came second after Netanyahu in the Likud primaries. He is a lifelong critic of judicial activism. Netanyahu's intentions, everyone knew, would be made clear by this test: Would he, or would he not, appoint Levin to be minister of justice?

At the end of December, he did.